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No. 90-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

REPLY MEMORANDUM

Of Counsel:

THEODORE J. BOUTROUS, JR.
JOSEPH AVANZATO
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

KIMBERLY D. REED
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 400
Los Angeles, California 90067

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303
(202) 955-8500

JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 400
Los Angeles, California 90067
(213) 552-8500

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY MEMORANDUM

In the Petition, Pacific Lighting Corporation ("Pacific Lighting"), Fredricks Development Corporation ("Fredricks") and Dunn Properties Corporation ("Dunn"), demonstrated that the California punitive damage system is a manifestly standardless and random regime that inflicts monetary punishments in unpredictable, inconsistent and excessive amounts against similarly situated defendants. Although the California Court of Appeal in this case expressly and unequivocally rejected the argument that such state-imposed punishments violate the Due Process Clause of the Fourteenth Amendment, citing previous California decisions rejecting a full range of due process challenges to punitive damages, Pet. App. 12a, respondent's Brief in Opposition nonetheless unaccountably argues at length that this Court lacks jurisdiction to review the federal question presented in the Petition. Opp. at 4-27. Respondent also

attempts to distinguish this case from *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990), despite the fact that the Court of Appeal expressly referred to the grant by this Court of certiorari in *Pacific Mutual* in rejecting the due process challenges below. Respondent argues on the merits that California law contains standards that sufficiently limit the discretion of juries to impose punitive damages, and that historical acceptance of these standards insulates them from attack under the Due Process Clause. Petitioners will address each of these arguments in turn.

1. As discussed in the Petition, at 5-6, petitioner Pacific Lighting argued in the California Court of Appeal that the imposition of "unlimited" punitive damages in this case by an "uncontrolled" jury pursuant to "unspecified, nebulous, and ultimately meaningless" standards violated "concepts of fair play and justice embodied in the Due Process Clause . . . ." Pet. App. at 18a-21a. Relying upon California decisions discussing various due process objections to punitive damages,[1] the Court of Appeal rejected that argument, concluding that "punitive damages are constitutional under . . . . the due process provisions of the Fourteenth Amendment." Pet. App. 12a. The Court of Appeal also explicitly acknowledged that this Court had granted the petition for certiorari in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990), which presents due process challenges to the vague standards governing punitive damages in Alabama and the excessiveness of the award in that case. Pet. App. at 21a.[2]

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[1] These cases, *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974), and *Zhadan* v. *Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132 (1976), challenged both the vagueness of standards for determining liability for punitive damages and for determining the amount of the award. *See* Pet. at 6 & n.4.

[2] After its citation to the California cases rejecting due process challenges to punitive damages, the court below added a "*but see*" citation to this Court's order granting review of *Pacific Mutual*. Pet. App. at 12a.

All three petitioners reiterated these due process objections to the punitive damage award in the Supreme Court of California, and argued that this case presents the same federal constitutional challenges to punitive damages as *Pacific Mutual*. The Supreme Court of California denied review.[3]

It is well settled that "[t]here can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). Respondent thus concedes, as it must, jurisdiction with respect to petitioner Pacific Lighting. Opp. at 3-4, 12. Respondent, however, attempts to characterize narrowly the due process question as dealing with "one limited issue"—whether "the California scheme for assessment of punitive damages violates Due Process *because it does not set a ceiling in advance on the amount of punitive damages that can be assessed.*" Opp. at 3-4 (emphasis in original).

As discussed above and in detail in the Petition, Pacific Lighting's due process arguments in the Court of Appeal challenged the jury's " 'wholly standardless discretion' "[4] to inflict punishment in this case and the resulting lack of "fair play and justice . . . . " Pet. App. at 19a-21a. Pacific Lighting thus objected not just to "ceilingless" punitive damages but to the complete lack of any objective standards or guidelines affording advance notice to defendants of the potential magnitude of the punishment

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[3] The California Supreme Court recently denied review in another case involving "tortious interference with business relations" in which the California Court of Appeal expressly rejected federal due process objections to an $8,500,000 punitive damage award in an "unpublished opinion." *See Hilgedick* v. *Koehring Finance Corp.*, No. A039723 (Cal. Ct. App. Aug. 30, 1990).

[4] Pet. App. at 18a-19a, *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring).

for engaging in specifically defined conduct. *See* Pet. App. at 20a & n.9.

The Court of Appeal's citation to California cases rejecting similar "vagueness" challenges to punitive damages, as well as its citation to *Pacific Mutual*, make clear that the court correctly understood Pacific Lighting's due process objections to be directed at all aspects of the standardless California punitive damage regime and the arbitrary award that it produced in this case. The Court of Appeal's holding that "punitive damages are constitutional" under the Due Process Clause sweepingly disposed of these arguments.

To the extent that petitioners have refined and supplemented their due process arguments or articulated the due process question with greater specificity in this Court, it is well settled that the "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198 (1899); *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Illinois* v. *Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below."). Therefore, respondent's complaint that the Petition advances due process arguments that are "different" than those made below (Opp. at 25) must be rejected.

2. Respondent also contends that "[t]here is simply no jurisdiction" vested in this Court to review the portion of the $2,000,000 punitive damage award allocated by the

jury to petitioners Fredricks and Dunn because they raised their federal due process claims for the first time in the Supreme Court of California. *See* Pet. at 5 n.3. But that fact is simply irrelevant to this Court's jurisdiction given that the Court of Appeal expressly addressed and rejected the federal question presented in the Petition, and the Court therefore need not even inquire into the manner of presentation. *See, e.g., Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (" 'it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided' ") (citation omitted); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980) (because the court below decided the constitutional issue, "there is no doubt that it is properly presented for review by this Court"); *Raley*, 360 U.S., at 436.

Thus, for example, in *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974), the appellee argued that a federal constitutional question was not properly before the Court "because appellant did not raise it on his state appeal." This Court rejected that argument, concluding that "whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice." *Id.*, at 157. Therefore, under cases like *Jenkins*, even if *none* of the parties raise a federal question in state court, but the court below nonetheless decides it, this Court indisputably has jurisdiction.

3. Respondent urges this Court to deny review of this case because "there is nothing about . . . [the] petition that can commend itself to this Court." Opp. at 12. In particular, respondent argues that the case at bar is "very different" from *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1989), and that therefore "[n]othing that could result from that case will be dispositive here." Opp. at 12.

Respondent's assertion that this case differs from *Pacific Mutual* is relevant in a manner that respondent may not fully comprehend. The respondents in *Pacific Mutual* have argued that the specific facts and the underlying record in that case make it an inappropriate vehicle for consideration of the question whether the standardless imposition of punitive damages violates the Due Process Clause.[5] Due to the undifferentiated verdict in *Pacific Mutual*, it has become a matter of controversy what portion of the verdict, if any, constitutes punitive, rather than compensatory, damages.[6] By contrast, there is no question that the jury in this case inflicted a $2,000,000 award that was *purely* punitive.[7] Thus, to the extent this case differs from *Pacific Mutual*, it differs in a way that makes it a much better case in which to review the question whether punitive damages violate the Due Process Clause.[8]

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[5] *See* Resps. Br. in Opp. at 7-10.

[6] *See* Petitioner's Letter Brief (filed Oct. 29, 1990); Response to Petitioner's Post-Argument Letter Brief and Post-Argument Brief of Respondents (filed Nov. 6, 1990). In response to questions regarding the breakdown of compensatory and punitive damages, counsel for Pacific Mutual suggested during oral argument that the punitive portion of the verdict could be calculated by subtracting the amount of compensatory damages requested in the complaint from the total verdict, and agreed to provide the Court with citations to Alabama cases that precluded juries from awarding compensatory damages in an amount that exceeds the prayer. Tr. at 4-6.

In its post-argument submission, Pacific Mutual appears to acknowledge that Alabama law permits juries to award compensatory damages in excess of the amounts prayed for in the complaint. Letter Br. at 3-5. The respondents have accordingly urged that it is not possible to calculate the amount of the punitive portion of the verdict in *Pacific Mutual* simply by subtracting the requested amount of compensatory damages from the total verdict.

[7] Similarly, there is no dispute that the $500,000 punitive damage award in *Reserve Life Insurance Co.* v. *Eichenseer*, *cert. pending* (No. 89-1303), was inflicted solely to punish.

[8] This Court has dismissed cases as improvidently granted where the briefs and oral argument reveal facts that "sufficiently cloud[ ] the record

4. Respondent also contends that petitioners' due process claims are "meritless" because they ignore recent "California common law developments" that purportedly limit the discretion of juries to impose punitive damages. Opp. at 28. As an example of these developments, respondent points to *People ex rel. Department of Transportation* v. *Grocers Wholesale Co.*, 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989), and asserts that that case establishes a rule that punitive damage "awards should not exceed 10% of the defendant's net worth absent unusual or egregious circumstances." Opp. at 28. However, not even such an extremely broad and elastic "rule" can be extracted from *Grocers Wholesale* or any other California case. Indeed, the California Court of Appeal in *Grocers Wholesale* expressly acknowledged that "calculation of punitive damages is a 'fluid process' that 'does not involve strict adherence to a rigid formula' . . . . " 214 Cal. App., at 515.[9] Recent California punitive damage verdicts con-

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to render the case an inappropriate vehicle" for the Court to decide a federal question. *Jones* v. *Board of Education*, 397 U.S. 31, 32 (1970) (per curiam); *e.g.*, *Odom* v. *United States*, 400 U.S. 23 (1970) (per curiam); *Moon* v. *Maryland*, 398 U.S. 319 (1970) (per curiam); *Wainwright* v. *City of New Orleans*, 392 U.S. 598, 599 (1968) (Fortas, J., concurring) ("Upon oral argument and further study after the writ was granted, it became apparent that the facts necessary for evaluation of the dispositive constitutional issues . . . are not adequately presented by the record before us."); *see generally Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78-79 & n.2 (1955), *and cases cited*. If the Court does so in *Pacific Mutual*, it should grant the Petition in this case or one of the other pending cases that clearly present due process challenges to a punitive damage judgment.

[9] The *Grocers Wholesale* court relied upon *Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984), which is discussed in the Petition, at 9-10, and which expressly concluded that a "formula does not exist" for calculating punitive damages. 155 Cal. App. 3d, at 388. Instead, it is "to put it mildly an unscientific process," that depends upon the individual jurors' "background, temperament and societal concerns," and is "further complicated by the lack of objective criteria . . . as to 'how much' is necessary to punish and deter." *Id. See also Gagnon* v. *Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1604, 260 Cal. Rptr.

firm that the wealth of the defendant does little to restrain the unlimited discretion of juries to punish. *E.g., Greenwood & Company Real Estate Co.* v. *C-D Investment Co.*, No. C 523-923 (Super. Ct., Los Angeles Co., Cal. March 5, 1990) (imposing $5,000,000 punitive damage award against one individual defendant, amounting to 1000% of defendant's net worth, and $4,000,000 punitive damage award against another individual defendant, amounting to 1400% of defendant's net worth in "tortious interference" case involving real estate sales commission dispute) (notice of appeal filed).

In addition, respondent points to the 1987 amendments to California's punitive damage statute, *Cal. Civ. Code* § 3294, and suggests that it added significant "protections" that cure any due process defects of the system. Opp. at 2, 17-20. That legislation, however, did nothing to improve the system. Instead, it added new and highly subjective terms like "despicable" to describe the conduct that can form the basis of liability for punitive damages. This Court has in other contexts condemned similarly "loose and unlimiting" standards for imposing punishment. *See Giacco* v. *Pennsylvania*, 382 U.S. 399, 403 (1966). Furthermore, the California legislature in 1987 did not include *any* limits or standards in the statute for determining the amount of punitive damages in a particular case.

5. Finally, respondent argues that because punitive damages existed at the time the Fourteenth Amendment was adopted, the current punitive damage system cannot be challenged under the Due Process Clause. Opp. at 29. But the imposition of unlimited punishment in the form of pu-

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305 (1989) ("the case law strongly suggests that a ratio in and of itself has little inherent meaning .... In the final analysis, therefore, the propriety and amount of punitive damages *depends entirely upon the facts of a case.*") (emphasis added); *Wetherbee* v. *United Insurance Co.*, 18 Cal. App. 3d 266, 271, 95 Cal. Rptr. 678 (1971) ("there is no fixed ratio ... the factors influencing the amount of the exemplary damages can only be disclosed by the trial record.").

nitive damages is an anomaly in our jurisprudence that did not emerge until the latter part of the Nineteenth Century.[10] The practice was sharply and immediately criticized by many courts. *See, e.g., Fay* v. *Parker*, 53 N.H. 342, 382 (1872) ("The idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."). *See also Smith* v. *Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) ("the doctrine of punitive damages has been vigorously criticized throughout the Nation's history").

The doctrine of punitive damages has gone through a radical transformation in the last two decades, frequently and randomly producing "skyrocketing" awards. *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring and dissenting).[11] The modern punitive damage system is the product of a gradual and " 'unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion should make [the Court] hesitate to correct.' " *Bloom* v. *Illinois*, 391 U.S. 194, 198 (1968) (citation omitted). *See also Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) ("neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack").

Certiorari should be granted and this case set for plenary consideration.

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[10] By the time the Fourteenth Amendment was ratified, the States had universally rejected the concept of unlimited punishment and enacted comprehensive criminal codes defining substantive criminal offenses and establishing specific ranges of punishments for those offenses. *See* Brief *Amici Curiae* of Aetna Life Insurance Company, *et al.*, at 12-16, in *Pacific Mutual.*

[11] *See* Brief *Amici Curiae* of American Institute of Architects, *et al.*, at 6-27, in *Pacific Mutual.*

November 27, 1990

Respectfully submitted,

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5303
(202) 955-8500

JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 400
Los Angeles, California 90067
(213) 552-8500

Attorneys for Petitioners

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Of Counsel:

THEODORE J. BOUTROUS, JR.
JOSEPH AVANZATO
GIBSON, DUNN & CRUTCHER
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KIMBERLY D. REED
GIBSON, DUNN & CRUTCHER
2029 Century Park East
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Los Angeles, California 90067